FEBRUARY 2012 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

(a) Fred may well be able to take ownership of the ring. Under the Lost and Unclaimed Property Act, MCL 434.21 *et seq.*, Fred must "report the finding and deliver the property to a law enforcement agency in the jurisdiction where the property is found." MCL 434.22. If he "wishes to receive the property if it is not claimed by the legal owner as provided in [the Lost and Unclaimed Property Act], the person shall provide his or her name and current address to the law enforcement agency." *Id.* If the owner of the ring can be established, it is returned to the owner. MCL 434.24(7). Here, the only potential clue to the owner is the initials "TSC" on the ring. If the owner does not claim the ring within six months, it is returned to the finder. MCL 434.26(1); MCL 434.25(2).

This analysis is no different under Michigan common law, whereby a finder of property has complete title to found property over all others except the owner. *Cummings v Stone*, 13 Mich 70 (1864). This common-law right applied even when the finder was on another's land. *Doe v Oceola Twp*, 84 Mich App 514 (1978).

(b) Larry likely *cannot* take ownership of the ring. The Lost and Unclaimed Property Act provides the *finder* of lost property with the right to receive the property if the actual owner is not found within six months. MCL 434.26(1); MCL 434.25(2). Since it provided no avenue for a landowner to receive lost property found

by another on his property, the Legislature rejected the doctrine of *locus in quo* in adopting the Lost and Unclaimed Property Act.

This policy decision codified Michigan courts' rejection of the *locus in quo* doctrine under Michigan common law. See *Willsmore v Oceola Twp*, 106 Mich App 671, 686 (1981) ("[T]his Court does not find a basis to award the money to claimant Powell by establishing a precedent in favor of the *locus in quo* owner."), *superceded by statute* as stated in *People v $27,490*, 1996 WL 33348190 ("[*Locus in quo*] has been squarely rejected by the Legislature.") While Michigan courts have recognized the concept of a joint finding where two parties participate in the find of lost property, *Cummings v Stone*, 13 Mich 70 (1864), there are no facts to indicate a joint finding in this situation because Larry was not with Fred when he found the ring.

(c) Larry may well be able to take ownership of the gold ingots. The Lost and Unclaimed Property Act applies whether the property was lost (accidentally misplaced) or mislaid (intentionally placed and subsequently forgotten). *Willsmore v Oceola Twp*, 106 Mich App 671 (1981), *superseded by statute* as stated in *People v $27,490*, 1996 WL 33348190. Accordingly, Larry would have to report the finding of the metal box and gold ingots to local law enforcement pursuant to the Lost and Unclaimed Property Act, MCL 434.21 *et seq*. If, after six months, the true owner of the ingots does not claim them, then Larry can take ownership of them. The fact that the metal box containing the ingots was locked and had to be pried open is immaterial to whether he can take ownership of the box and its contents. See *Doe v Oceola Twp*, 84 Mich App 514 (1978). Similarly, the facts that the metal box was buried and covered with burlap are also immaterial, both under the Lost and Unclaimed Property Act and under the common law, as Michigan has not adopted the common-law doctrine of treasure trove. *Willsmore v Oceola Twp*, 106 Mich App 671 (1981), *superseded by statute* as stated in *People v $27,490*, 1996 WL 33348190.

ANSWER TO QUESTION NO. 2

1. Teri likely can stop Kevin from using the colonial as an art gallery: a court could enforce the restriction on use as an equitable servitude against Kevin, who had record notice of the restriction and can thus be enjoined from violating its terms.

In order to create a binding covenant that runs with the land (as opposed to merely a personal obligation), the grantor and grantee must have intended that the covenant run with the land, the covenant must touch or concern the land with which it runs, and the purchaser must have notice of the covenant. See *Greenspan v Rehberg*, 56 Mich App 310 (1974).

Here, Teri and Phil executed a binding contract that clearly intended to run with the land because it restricted forever the use of Phil's land to a single family dwelling. The contract they executed and recorded was expressly made binding on Phil's "heirs and successors." Further, the promise "touched and concerned" the land because it restricted the use of Phil's land in a manner that presumably enhanced the value of Teri's land, or at minimum, affected Teri's enjoyment of her land. The "touch and concern" element is ordinarily met when the covenant affects "the nature, quality, or value of the property demised independent of collateral circumstances, or . . . affects the mode of enjoyment." *Greenspan, supra*. Finally, it is clear from the facts that Kevin had notice of the restriction. Because Teri and Phil recorded their contract, they provided record notice to Kevin, who would discover the existence of the contract in a public record search. Note that it is irrelevant whether Kevin actually knew of the existence of the contract because recordation also imparts constructive notice of the restriction to future owners of the land. *Richards v Tibaldi*, 272 Mich App 572 (2006). As a result, the restriction agreed to by Teri and Phil could be enforceable against Kevin as an *equitable servitude*. (NB: it is irrelevant if the land is otherwise zoned appropriately for Kevin to open a business.) Accordingly, at Teri's request a court should enjoin Kevin's use of the colonial as an art gallery.

2. Teri likely cannot stop Kevin from using the driveway for his personal use but likely can limit its use by others: a court will likely hold that Kevin enjoys an easement implied in law (quasi-easement), but Teri may be entitled to an injunction limiting the use of the easement to a driveway serving a single

family dwelling.

Michigan courts will imply an easement from a pre-existing use where an owner of land subdivides and sells a portion of the property. Absent an agreement to the contrary, the law presumes that a purchaser buys the land with the understanding that he will be able to continue to use the existing easement. See *Kamm v Bygrave*, 356 Mich 189 (1959). The Michigan Supreme Court has explained:

"Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made."

Rannels v Marx, 357 Mich 453 (1959) (citations, internal quotation marks omitted); see also *Smith v Dresselhouse*, 152 Mich 451 (1908) ("It is a general rule of the law of easements that where the owner of two tenements sells one of them, the purchaser takes the portion sold with all the benefits and burdens which appear at the time of sale to belong to it as between it and the property which the vendor retains.").

In this case, Teri created a private driveway crossing her land to service the new colonial. When she subdivided the land and sold the new colonial to Phil, the driveway became *reasonably necessary* for Phil's use and enjoyment of his land. The private driveway is the only method of ingress and egress to/from Phil's colonial, and the home has no other access to Main Street. Under these circumstances, a court will likely imply the grant of an easement from Teri (servient tenement) to Phil (dominant tenement), and thus to Phil's successors. Accordingly, Kevin has a continuing right to use the private driveway that crosses Teri's land.

However, as Michigan law also makes clear, the holder of an easement implied in law cannot increase the burden of the easement on the servient tenement. The use of the implied easement is limited to that which existed at the time the land was subdivided. The general principle underlying the use of the easements is that

"the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Delaney v Pond*, 350 Mich 685 (1957); see also *Soergel v Preston*, 131 Mich App 585 (1985). Generally in cases of implied easements, the owner of a right to use a private driveway is not limited in use by himself, but it may be used by the owner's family, tenants, social guests, and the like. See Michigan Law & Practice Encyclopedia 2d, Real Property §112 (collecting authorities).

Under these facts, a court could limit Kevin's use of the easement to that of a driveway serving a single family dwelling. Thus, even assuming that Kevin is allowed to operate an art gallery out of his colonial, his patrons, service providers, and other members of the general public would not be allowed to traverse the private drive because that would undoubtedly result in an increased burden of the easement on Teri's land due to increased traffic, wear and tear on the private drive, et cetera.

ANSWER TO QUESTION NO. 3

1. Validity of the testamentary Trust:

A testamentary trust is a trust created within a will and executed with the formalities required of a will, which does not take effect until the death of the settlor. *In re Messer Trust*, 457 Mich 371 (1998); MCL 700.7401(1)(a).

Generally, a will is valid in Michigan if it is (1) in writing, (2) signed by the testator, and (3) signed by at least two witnesses within a reasonable time after witnessing either the testator signing the document or acknowledging the will. MCL 700.2502(1). In this case, because Amanda Alistair's document is not witnessed, it is not a valid will under the general provisions governing wills.

However, Michigan law also recognizes holographic wills, which are valid if the document is dated, signed by the testator, and the material portions of the document are in the testator's handwriting. A holographic will does not require witnesses. MCL 700.2502(2). Here, because the facts indicate that the will was "handwritten by Alistair," and the document was signed and dated, it is a valid holographic will.

In order to ascertain whether a valid trust has been created within the will, the trust must comply with the requirements contained in the Michigan Trust Code, MCL 700.7101, *et seq.* Pursuant to MCL 700.7402, a trust is created only if the five statutory requirements are met: (1) the settlor has the capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) either the trust has a definite beneficiary, is a charitable trust, a trust for a non-charitable purpose or a pet care trust; (4) the trustee has duties to perform, and (5) the same person is not the sole trustee and sole beneficiary.

Here, all of the statutory requirements for the creation of a trust have been met. The document handwritten by Alistair evinces her capacity to create at trust, indicates a clear intention to create a trust, the trust is for her pets' care. Moreover, Candy Coffman as trustee has duties to perform under the trust, and she is not a beneficiary at all, much less the "sole beneficiary." Therefore, the document written by Amanda Alistair is a valid testamentary trust.

2. Reduction of the trust property:

Michigan law specifically recognizes the validity of pet care trusts. MCL 700.2722(2). MCL 700.2722(3)(f) specifically gives a court the discretion to reduce the amount of property in a pet care trust "if it determines that that amount substantially exceeds the amount required for the intended use." Thus, if a court were to determine that $20 million dollars "substantially exceeds" the amount required to provide for the maintenance and care of the cats for the duration of their lifetime, the court may permissibly reduce the trust property accordingly.

When the trust property is reduced, the amount of the reduction passes as "unexpended trust property" under §2722(3)(b). As the terms of the trust provide that Jessica Jejune is to receive the remaining trust assets, Jessica would receive the funds if the court exercised its discretion and reduced the amount of property in the trust.

ANSWER TO QUESTION NO. 4

1. **This is a modification of custody order question**: The test taker needs to recognize that a motion to change custody requires three separate inquiries: (1) whether the movant carries the initial burden of establishing "proper cause shown" or a "change of circumstances;" (2) whether there is an established custodial environment; and (3) whether the modification is in the best interest of the child. Note also that a trial court may not change custody without first holding a hearing. *Dick v Dick*, 210 Mich App 576, 587 (1995); MCL 3.210(C)(1).

A. Pursuant to MCL 722.27(1)(c), when there is a request for a change of custody from an existing custody order, the first issue to be considered is whether the movant has shown "proper cause" or a "change of circumstances." To establish the "proper cause" or "change of circumstances" necessary to revisit a custody order, a movant must prove **by a preponderance of the evidence** the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. There must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. An evidentiary hearing is not necessary to make this determination. *Vodvarka v Grasmeyers*, 259 Mich App 499, 512-514 (2003).

Barbara will argue that Alex essentially abdicated his role as primary physical custodian of Claire, and that in addition, because his new girlfriend could not be left alone with Claire, this is both proper cause and a change of circumstances. The fact that Claire was not in the day-to-day care of either of her parents is relevant to a number of the best interest factors, including (a) the love, affection, and other emotional ties between child and parent, (b) the capacity of the parent to give the child love, affection, and guidance and contribute to the child's education, and (c) the length of time the child lived in a stable environment. See MCL 722.23. Alex's extended absence was also likely to have a significant impact on Claire's well-being. Alex will argue that he has not abandoned Claire and the fact that he has a new girlfriend who cannot be left alone with her is irrelevant. Here, the court should find proper cause or a change in circumstances.

B. The next question is whether an established custodial

environment exists. Answering that question is critical for determining the burden of proof. A custodial environment is established if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c).

Barbara should argue that Alex's absence meant that Claire no longer looked to him for guidance, discipline, etc. Moreover, a custody order, by itself, does not establish a custodial environment, and an existing custodial relationship can be destroyed, for example, by "repeated changes in physical custody and uncertainty created by an upcoming custody trial". *Bowers v Bowers* (After Remand), 198 Mich App 320, 326 (1993). Barbara will argue that Alex essentially deserted Claire, thus at least temporarily relinquishing custody and destroying the custodial environment. Alex will argue that he spent enough time with Claire to maintain the established custodial environment. He might argue that the arrangement was only temporary because he was not married to his girlfriend and he was considering a move back to Kalkaska. A court would likely find that Alex did not have an established custodial environment with Claire, however, because his absence from her daily life was extensive and regardless of his future plans, any established custodial environment was destroyed at the time the motion was filed.

C. If a custodial environment was established, a change in custody could only be **made on clear and convincing evidence** that the change is in the best interests of Claire. MCL 722.287(1)(c); *Rittershaus v Rittershaus*, 273 Mich App 462, 470 (2007). If no established custodial environment existed, custody could be modified by a showing of **a preponderance of the evidence** that a change would be in Claire's best interest. *Hall v Hall*, 15 Mich App 286, 289 (1986). The best interest factors for a change of custody are the same as those for determining custody in the first instance: MCL 722.23. The test taker does not need to list the best interest factors, but should identify those that are relevant based on the facts presented in the question.

Here, the following should be noted: (a) Love and affection between parents and child--given Alex's conduct, this factor would tend to favor Barbara; (b) capacity to provide love, affection and guidance--tends to favor Barbara given that Alex's girlfriend cannot be with Claire alone; (c) capacity to provide food, clothing, medical care, and other physical needs--Barbara earns more but economic disparity could be ameliorated by child support

payments; (d) length of time in a stable environment--Alex disrupted Claire's environment, so she was not in a stable environment; (3) the permanence, as a family unit, of the existing or proposed custodial home or homes--favors Barbara because Alex is not stable; (f) the moral fitness of the parties involved--probably neutral; and (g)-(h) no fact indicates a problem with physical or mental health, the home or school environment, or the preference of the child. Note that there is no "tender years" doctrine in Michigan which would favor Barbara because she is the mother.

2. **This is a modification of child support question**: MCL 552.603(2) provides that a child support order is not subject to retroactive modification. There is a limited exception for fraudulently reporting income, but the exception is not applicable here. Support may be modified, however, for the period during which the motion is pending. Note that although Alex arguably violated the requirement to notify the Friend of the Court of his change in address, he is only subject to paying a fee for that error; it does not render child support retroactively modifiable. Barbara's motion to modify support should be granted, but support may only be modified as of the date that Barbara's motion was pending.

ANSWER TO QUESTION NO. 5

The examinee should conclude that the question implicates Article 9 of the Uniform Commercial Code. MCL 440.9109(1)(a). The Article applies to all transactions, regardless of form, that create a security interest in personal property (not real property) or fixtures by contract. The issue posed by this question is whether ABC has a purchase money security interest in the "A-Type batteries," that is superior to that of Bank A.

(1) ABC must establish under MCL 440.9103(2) that it has a purchase-money security interest in the "A-Type batteries." That section provides:

"(2) A security interest in goods is a purchase-money security interest to the following extent, as applicable:

"(a) To the extent that the goods are purchase-money collateral with respect to that security interest.

"(b) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest."

Further, a "Purchase-money obligation" "means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." MCL 440.9103(1)(b).

ABC can establish that the "A-Type batteries" are subject to a $20,000 purchase money security interest. DD used the line of credit extended by ABC to purchase $20,000 of the "A-Type batteries" and ABC has a purchase money security interest to the extent of that collateral, the "A-Type batteries." There are no facts suggesting that DD had previously purchased goods in its inventory from ABC from which ABC could claim a purchase money security in that inventory as well. Thus, ABC can establish that the "A-Type batteries" are subject to a $20,000 purchase money security interest.

(2) Assuming ABC has a purchase-money security interest, the examinee should attempt to classify the "A-Type batteries." The "A-Type batteries" are likely considered "'[i]nventory' [which] means goods, other than farm products . . . held by a person for

sale or lease or to be furnished under a contract of service." MCL 440.9102(vv) and (ii). The "A-Type batteries" are clearly "goods" under MCL 440.9102(1)(rr). Even though the "A-Type batteries" are ultimately intended for consumer use, "'[c]onsumer goods'" means goods that are *used or bought for use* primarily for personal, family, or household purposes." MCL 440.9102(w). As the question indicates, while the eventual purpose of the goods is for personal, family, or household purposes, DD's purpose for purchasing the goods better reflects that they would be considered "held for sale" and thus "inventory." MCL 440.9102(vv) and (ii). As an example cited in White and Summers 6th, §31.6 at 157, equipment held by a dealer for resale was held to be inventory rather than consumer goods. The examinee should attempt to distinguish between the eventual purpose of the goods and DD's use of the "A-Type batteries" under which ABC is asserting its security interest, and conclude that the goods purchased from ABC were intended for resale and are thus properly considered inventory.

Because "A-Type batteries" are inventory, ABC's security interest in the "A-Type" batteries is in conflict with Bank A's earlier filed security interest in DD's entire inventory. ABC will argue that it has a purchase money security interest in the "A-Type batteries" under MCL 440.9324, which provides that "a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory" if:

"(a) The purchase-money security interest is perfected when the debtor receives possession of the inventory.

"(b) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest.

"(c) The holder of the conflicting security interest receives the notification within 5 years before the debtor receives possession of the inventory.

"(d) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory." MCL 440.9324(2).

The answer should reflect that establishing a security interest in inventory, as opposed to consumer goods, has the above additional statutory requirements. MCL 440.9324(1). The facts of the question generally reflect that ABC established the above requirements for the "A-Type batteries."

ANSWER TO QUESTION NO. 6

Question 1: Henry's injury would very likely be considered an injury compensable under Michigan's workers' compensation statute, even though the discussion and argument leading to the injury related to sports and not work.

To be compensable under Michigan law, an injury must be one "arising out of and in the course of employment." MCL 418.301(1) [first sentence]. The mere occurrence of Henry's injury at the workplace does not, in and of itself, make the injury compensable because the injury must also be traceable to an employment risk. *Hill v Faircloth Mfg Co*, 245 Mich App 710, 717-719 (2001), *lv gtd*, 465 Mich 949, *lv vacated*, 466 Mich 893 (2002); see also, *Thomason v Contour Fabricators, Inc*, 469 Mich 960 (2003); *Ruthruff v Tower Holding Corp (On Reconsideration)*, 261 Mich App 613, 618 (2004).

Risks of employment can include "horseplay" and disagreements at the workplace, even if they relate to non-work matters. A lead case on this subject is *Crilly v Ballou*, 353 Mich 303 (1958). There, two young employees of a roofing company were throwing shingles at one another and one of the employees was injured. The court held that, "If the injury results from the work itself, or from the stresses, the tensions, the associations, of the working environments, human as well as material, it is compensable." *Id.* at 326. The court further explained that the "arising out of and in the course of employment" formula should include all activities that one can reasonably expect a person to engage in during his or her work time, regardless of whether they are furthering the employer's business. Compare, *Andrews v General Motors*, 98 Mich App 556 (1980).

Another important case in this area, *Petrie v GMC*, 187 Mich App 198 (1991), defined the boundaries of what constitutes compensable behavior by borrowing from Professor Larson's treatise on the subject. *Petrie* said Larson's following four-point test is relevant:

"[W]hether initiation of horseplay is a deviation from course of employment depends on: (1) the extent and seriousness of the [deviation], (2) the completeness of the deviation (*i.e.*, whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay."

Applying these rules here, Jack and Henry's discussion and disagreement would likely be considered an activity reasonably emanating from associations in a work environment, per *Crilly*. Similarly, applying *Petrie*/Larson's criteria, their disagreement: would not constitute a serious deviation from work (they were working at the time); the discussion leading to the argument was commingled with the performance of their work; the implication is that their conversations about sports were an accepted part of their everyday employment; and, the nature of their employment would be expected to include such discussions and "horseplay."

An examinee might identify and discuss the possibility that the injury is not compensable under either one or both of the following provisions of the statute. MCL 418.301(3) excludes from compensation "an injury incurred in the pursuit of an activity the major purpose of which is social or recreational." This exclusion should not apply because the "major purpose" of Henry's activity was not social or recreational. Another provision excludes injuries occurring "by reason of . . . intentional and wilful misconduct" by the employee. MCL 418.305. Henry's conduct would not be considered "misconduct" for the reasons stated earlier plus the fact Jack was the aggressor.

Therefore, in all likelihood, the injury resulting from the pushing incident would be deemed compensable as an injury arising out of and in the course of employment.

Question 2: The examinee should recognize the likelihood that GK, the general contractor, would likely be found liable under the statute's statutory-principal/contractor-subcontractor provision. MCL 418.171; *Bennett v Mackinac Bridge Authority*, 289 Mich App 616 (2010). This provision says that where a general contractor contracts with a subcontractor who does not have workers' compensation insurance, the general contractor is liable to an injured employee of the subcontractor under the workers' compensation system. MCL 418.171(1). Therefore, Henry has an avenue of recovery against GK, the general contractor. While the question does not specifically indicate that GK has workers' compensation insurance or is self insured, that is the implication in the sense that GK is identified as a large and well-established general contracting company. Even if there remains doubt whether GK has insurance or is self insured, a competent attorney should know this option needs to be explored. *Bennett, supra*.

The examinee may add that GK (if found liable) has, in turn, a right of indemnification against the uninsured subcontractor ABC under MCL 418.171(2). Also, although the question asks only for remedies under the workers' compensation system, an examinee might

note that the workers' compensation statute provides that a civil action may also be pursued by an employee against an uninsured employer. MCL 418.641. Rather than any points being detracted for such an observation, credit might be given for it.

ANSWER TO QUESTION NO. 7

Defendant sought to invoke the district court's subject matter jurisdiction on the basis of diversity, 28 USC §1332. To do so, defendant must show that there is complete diversity between the plaintiff and all defendants. *SHR Ltd Partnership v Braun*, 888 F2d 455, 456 (CA 6, 1989). Whether diversity jurisdiction exists is usually determined at the time the lawsuit is filed. *Curry v US Bulk Transport*, 462 F3d 536, 540 (CA 6, 2006). In this case, when plaintiff filed the complaint there was complete diversity because Smith was a resident of Tennessee, UHC was a resident of either Delaware or Illinois, and defendant Johns was a resident of Michigan.

However, the district court nevertheless properly remanded the case back to state court because defendant Johns was a resident of Michigan. Pursuant to 28 USC §1441(b), a case cannot be removed on diversity grounds if a properly served defendant is a resident of the state in which the state court action was brought. Thus, because Johns is a Michigan resident and was sued in a Michigan state court by a non-resident plaintiff, UHC could not remove it to the U.S. District Court in Michigan. *Hutchins v Cardiac Science Inc*, 456 F Supp 2d 173, 192 (D Mass, 2006).

With respect to issue two, a motion for summary disposition arguing no genuine issue of material fact is brought pursuant to MCR 2.116(C)(10). A motion under this subrule is only proper if it is supported by affidavits, admissions, depositions, or other documentary evidence. MCR 2.116(G)(3); *Barnard Manufacturing v Gates Performance*, 285 Mich App 362, 369-370 (2000). If the moving party does not support the motion as required by the court rules, the nonmoving party has no duty to respond and the motion must be denied. MCR 2.116(G)(4); *Barnard Manufacturing*, 285 Mich App at 370. However, if the motion is properly supported, the nonmoving party must come forward with substantively admissible evidence that establishes a genuine issue of material fact for trial. *Id.*

Here, defendants supported their motion with Johns' affidavit, a permissible piece of evidence under the court rule. An argument could be made that the affidavit was not proper because the contents contradicted Johns' prior sworn deposition testimony. See *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396 (2006). However, this argument cannot prevail because the trial court does not have a copy of Johns' deposition to compare with the affidavit, and therefore the affidavit cannot be disregarded. In light of this,

defendants' motion was properly supported and Smith's burden to oppose the motion arose.

Smith argued that Johns' deposition established at least a question of material fact about the reasons for termination, since he admitted that he thought Smith was "slowing down" because of his age. Normally, this sworn deposition testimony that goes to the heart of the case would create a jury issue. However, Smith's failure to submit the deposition into the record, or even attach the pertinent pages to his response brief, violated his duty under the court rule to oppose a properly supported motion with substantively admissible evidence. And, Smith's promise to provide the deposition the next day did not excuse his failures, as promises to produce evidence are not sufficient to meet his burden under the court rule. *Maiden v Rozwood*, 461 Mich 109, 121 (1999). The motion was properly granted.

Finally, the motion for reconsideration was properly denied. Although the motion was not based upon the deposition transcript filed with the trial court, generally a motion for reconsideration is not proper when it is based upon evidence that could have been submitted with the original motion. MCR 2.119(F)(3); *Cason v Auto-Owners*, 181 Mich App 600, 605 (1989). Additionally, a motion for summary disposition can only be decided based upon evidence submitted at the time the trial court decides the motion, *Pena v Ingham County Road Comm*, 255 Mich App 299, 310 (2003), and so the trial court properly denied the summary disposition motion based on the evidence presented at that time. Although an argument could be made that a trial court can give the first motion a "second look" through a motion for reconsideration, *Hill v City of Warren*, 276 Mich App 299, 306-07 (2007), that is not usually done and here it is difficult to make the argument when the facts do not disclose why Smith never ordered or filed the transcript until after the motion for summary disposition was decided.

ANSWER TO QUESTION 8

Plaintiff alleges a slander claim against both defendants. To prove slander, a plaintiff must produce evidence showing "(1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third-party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mino v Clio School Dist*, 255 Mich App 60, 72 (2003).

Because Johnson is a private figure plaintiff, a defamation defendant is not provided with the defense of a qualified privilege in the form of an actual malice standard. *J&J Construction Co v Bricklayers and Allied Craftsmen*, 468 Mich 722, 731 (2003). Instead, and as recognized in *J&J Construction*, 468 Mich at 732, pursuant to MCL 600.2911(7) a private figure plaintiff need only prove negligence on the part of the publisher, and has the burden to prove falsity if the statement relates to a matter of public concern. *Id.*, 468 Mich at 732 & n11.

A. Ryan's Motion: Defendant Ryan's motion should be denied, as genuine issues of material fact exist for trial. Plaintiff has provided evidence on all four elements, and a jury must decide whether the evidence proves all the elements. Specifically, defendant Ryan clearly made a false statement concerning Johnson, as he stated he left his house in a condition that violates city ordinances, and no ordinance violation was ever found. The statement was published to third-parties--namely members of the public who remained after the council meeting--and no recognized privilege existed to make the false remark. Evidence also suggests that defendant Ryan knew it was a false statement, as he was present when the city inspector found no violations. Finally, because Ryan stated that plaintiff was in violation of a criminal law, no special harm need be shown. MCL 600.2911(1). Thus, plaintiff' slander claim against defendant Ryan should proceed to trial.

[Note: Although some applicants might argue that an absolute privilege attached to Ryan's statement, the argument should be rejected because (1) Ryan's statements were made after the council meeting ended and no council members were present, and (2) the call of the question indicates that Ryan's motion was only a challenge to plaintiff's ability to establish a question of material fact on the elements of a slander claim, not to any possible defenses.]

B. Smith's Motion: Defendant Smith's motion raises an "immunity" defense. Two possible immunity defenses to a defamation claim exist under this fact scenario. One is based on Smith's position as Mayor; the other is based upon his statement being made at a council meeting.

Pursuant to MCL 691.1407(5), the highest elective executive at all levels of government are immune from all tort liability for injuries to persons as long as he was acting within the scope of his executive authority. There is no dispute that the Mayor is the highest elective official of a city. *Bennett v Detroit*, 274 Mich App 307, 319 (2006). Additionally, although Mayor Smith had self-interest in the subject matter, there is no real question but that a statement made by a mayor at a council meeting about an alleged ordinance violation comes within his executive authority. *Id.*

Plaintiff cannot successfully argue that Mayor Smith loses his immunity because he acted with bad intentions. Even though there is evidence he acted with an improper motive, there is no bad motive or intention exception to absolute immunity. *American Transmissions v Atty General*, 454 Mich 135, 143 (1997); *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 594 (2001). And, even though Smith also accused plaintiff of violating the law, which would constitute defamation per se under MCL 600.2911, it is of no avail because defendant Smith was acting within his executive authority when making the statement. *Id.*

Smith can also successfully argue that he was entitled to absolute immunity because his comments were made during the council meeting and arguably dealt with a matter of public concern, *i.e.*, violations of city ordinances. In *Kefgen v Davidson*, 241 Mich App 611, 618 (2000), the court held:

"Communications deemed absolutely privileged are not actionable, even when spoken with malice. *Froling v Carpenter*, 203 Mich App 368, 371; 512 NW2d 6 (1993); *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992). The doctrine of absolute privilege is narrow and applies only to communications regarding matters of public concern. *Froling, supra.* The absolute privilege has generally been applied to communications made during legislative and judicial proceedings and to communications by military and naval officers. *Id.; Couch, supra.* The doctrine was extended to communications made by a public official in furtherance of an official duty during proceedings of subordinate legislative and quasi-legislative bodies."

The absolute privilege for legislative bodies applies to subordinate bodies such as a city council, so "statements made by

city council members in the course of their duties are absolute privileged." *Froling v Carpenter*, 203 Mich App 368, 372 (1993).

Here, the best argument is that Mayor Smith's statements touched on a matter of public concern because it addressed the possible violation of a city ordinance. Additionally, the statements were made during the council meeting, and were in furtherance of the Mayor's duties to ensure the enforcement of local ordinances. An argument could be made that the statements only addressed a personal issue between the mayor and his neighbor, such that absolute immunity would not apply (elected officials do not have unfettered ability to slander individuals on whatever matters they please), and points can be awarded for that argument, but the better argument is that absolute immunity applies.

Defendant Ryan's motion for summary disposition should be denied, while defendant Smith's should be granted.

ANSWER TO QUESTION NO. 9

The validity of Carolyn's proxy to Tamara: Michigan law expressly permits shareholders to authorize other persons to act for them by proxy. MCL 450.1421(1). A proxy is generally only valid for 3 years, unless otherwise provided in the proxy. §1421(2). Prior to 1997, the Michigan Business Corporation Act required a signed writing to effectuate a proxy. However, 1997 PA 118 amended §1421, and a signed writing is no longer the exclusive means of effectuating a valid proxy. Section 1421(3) lists two means by which a shareholder can grant authority to a proxy: a writing signed by the shareholder of his agent, §1421(3)(a); or authorization granted by electronic transmission, provided there is sufficient information to determine that the electronic transmission was authorized by the shareholder. §1421(3)(b). However, a shareholder is not limited to those two methods, as the statute specifically declines to "limit[] the manner in which a shareholder may authorize another person" to act as a proxy.

Applying the law to the facts of this case, the video proxy is valid. The statute expressly contemplates alternative means of granting a proxy authorization besides a signed writing or electronic transmission. The facts do not reveal any concerns with Carolyn's identity or status as a shareholder, and Carolyn's authorization to Tamara is clear. Therefore, Carolyn was wrongfully denied the ability to vote her shares by proxy at the annual shareholders' meeting.

Whether Dan could participate in the shareholders' meeting: MCL 450.1405(1) specifically provides that "[u]nless otherwise restricted by the articles of incorporation or bylaws, a shareholder may participate in a meeting of shareholders by a conference telephone or by other means of remote communication through which all persons participating in the meeting may communicate with the other participants." In fact, unless otherwise restricted, the board of directors may conduct a shareholders' meeting solely by remote communication. §1405(3).

Thus, the default position in Michigan is that a shareholder may participate in a shareholders' meeting remotely unless it is restricted by the articles of incorporation or bylaws. While the board of directors may adopt guidelines and procedures for the remote participation of shareholders, a shareholder is considered "present in person" and may vote at the meeting if (a) reasonable measures are implemented to verify that the person is a

shareholder; (b) the shareholder is provided a reasonable opportunity to participate in the meeting and vote, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceedings; and (c) a record of the vote or other action is maintained by the corporation. §1405(4)(a)-(c).

Applying the law to the facts of this case, it is irrelevant that Enfoo's bylaws and articles of incorporation do not specifically provide for remote participation; so long as remote participation is not restricted, it is permitted. The facts indicate that Dan and the other participants could readily communicate with each other via speaker phone. The fact that the phone call was placed from Dan's house, as well as Dan's "distinctive falsetto voice," should provide sufficient verification that the person participating remotely is Dan. However, if the corporation wanted to, it could take additional reasonable measures of verification. Dan was wrongfully denied the ability to participate in the annual shareholders' meeting by telephone.

Actions and remedies available to Carolyn and Dan: Michigan law specifically provides for both direct actions and derivative actions. A shareholder may file an action to establish that "the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive *to the corporation or to the shareholder*." MCL 450.1489(1) *(emphasis added)*.

Whether a suit is appropriately brought as a direct action or as a derivative action depends on the nature of the claimed injury. Where the injury is caused to the corporation, the suit must be brought in the name of the corporation as a derivative suit. *Michigan Nat Bank v Mudgett*, 178 Mich App 677 (1989). However, where the "wrong done amounts to a breach of duty owed to the individual personally," a direct action may be maintained. *Id.* at 680.

In this case, Carolyn and Dan do not seek to enforce the rights of the corporation. Rather, they seek redress for the violations of Michigan law, resulting in the deprivation of their right as shareholders to vote for the board of directors. Therefore, a direct action is appropriate.

If a shareholder establishes grounds for relief, the circuit court may "make an order or grant relief as it considers appropriate," including an order providing for the "cancellation, alteration, or injunction against a resolution or other act of the

corporation." MCL 450.1489(1)(c). Because the facts indicate that either Carolyn's or Dan's vote would alter the outcome of the election, the judge may cancel the results of the directors' election if the claims of Carolyn and Dan are determined to be meritorious.

ANSWER TO QUESTION NO. 10

The key to analyzing this question is MRPC 1.9(c). That rule restricts a lawyer's use or revelation of information relating to the representation of a former client.

MRPC 1.9(c)(1) prohibits a lawyer from using information relating to the representation of a former client to the disadvantage of the former client with only two exceptions. First, the information may be used if allowed or required by MRPC 1.6 (the rule on confidentiality of information) or 3.3 (requiring candor to a tribunal) with respect to a client. Second, the lawyer may use information that "has become generally known."

MRPC 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation unless MRPC 1.6 or 3.3 would allow or require revelation with respect to a current client.

No exceptions apply to this scenario.

First, MRPC 1.9(c)(1)'s exception for information generally known is not applicable. It is clear from the fact-pattern that Arnie has kept Dan's confidences and secrets inviolate up to this point; the information is not generally known.

Also, none of the exceptions to the duty of confidentiality in MRPC 1.6 are applicable. The facts do not indicate that Dan consented to the disclosure of the information. MRPC 1.6(c)(1). With respect to MRPC 1.6(c)(2)'s exceptions, there is no court order mentioned in this fact-pattern, and the provision as to disclosure of client confidences or secrets when required or allowed by law has not been shown to be applicable; the propriety of disclosure under the rules is analyzed throughout this question and no other law has been suggested in the question. Also, Dan did not use Arnie's services to commit a crime or fraudulent act, so MRPC 1.6(c)(3) does not apply. Further, no future crime is contemplated by Dan, so MRPC 1.6(c)(4) is likewise inapplicable.

Another exception, MRPC 1.6(c)(5), allows revelation of "confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct." This exception also does not allow Arnie's conduct. Even though a threat to reveal confidential information to the detriment of one's client might, indeed, motivate the client to pay the fee, thus assisting in

collection, the comment to MRPC 1.6 explains the limits of MRPC 1.6(c)(5)'s exception:

"A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

In other words, the exception allowing lawyers to reveal confidential information to collect a fee is limited to that which is necessary, for example, to pursue appropriate legal processes such as reducing the claim to judgment and engaging in post-judgment collection proceedings. Even then, care should be taken to reveal only that which is necessary and to minimize disclosure through protective orders or other appropriate means. Threatening to reveal confidences to opposing parties or others who would be likely to harm the client upon revelation is obviously not allowed by this exception.

Finally, MRPC 3.3 does not allow Arnie to use the information confided to him in order to leverage payment of his fees. MRPC 3.3 prohibits the introduction of false evidence and requires a lawyer to remedy the situation, if necessary through disclosure to the tribunal, when he subsequently learns that material evidence he has offered is false. MRPC 3.3(a)(3). This rule is not applicable. Dan pled guilty and the facts contain no mention of any false testimony or other evidence.

Accordingly, Arnie has violated MRPC 1.9(c)(1). See *Grievance Administrator v Paula D. Thornton*, Case No. 05-112-GA (Michigan Atty. Disc. Bd., June 21, 2007), and cases cited therein. His actual revelation of the confidences and secrets would be in violation of MRPC 1.9(c)(2).

Additionally, there is no problem with Arnie insisting, prior to the plea, that the state prove its case even though Dan had confided to Arnie that he committed the charged crime. MRPC 3.1.

An astute applicant might also correctly identify Arnie's conduct as a violation of Michigan's extortion statute, MCL 750.213. Such conduct likely constitutes professional misconduct under MRPC 8.4(b) by "engaging in conduct involving . . . violation of the criminal law, where such conduct reflects adversely on the

lawyer's honesty, trustworthiness, or fitness as a lawyer." It also certainly meets the much lesser standard set forth in MCR 9.104(A)(5) as interpreted by the Michigan Supreme Court in *Grievance Administrator v Deutch*, 455 Mich 149 (1997), which held there is no limitation on the types of criminal violations that are regarded as professional misconduct, regardless of how it reflects on the lawyer's fitness to practice law. An applicant who identifies the potential ethical violation under MRPC 81.4 and/or MCR 9.104(A)(5) is deserving of an additional point or two depending upon the clarity of the discussion.

ANSWER TO QUESTION NO. 11

Carl made two promises to Paula in December 2011 in exchange for her agreement to manage his 2012 Congressional campaign: (A) to pay her a consulting fee of $15,000 per month through the November 6, 2012 general election, and (B) to pay her $8,000 per month throughout calendar year 2013. The question suggests the following issues:

(1) Can Paula bring suit now for payments that are not yet due?

(2) Is there consideration to support any unperformed part of the contract?

(3) Are Carl's promises enforceable in light of the statute of frauds?

(4) Is the contract severable so that one of Carl's promises can be enforced even if the statute renders the other unenforceable?

(5) To the degree that the contract is unenforceable because of the statute of frauds, is there a non-contractual theory that will afford Paula relief?

(6) Is Paula entitled to any damages or restitution, and how should they be measured?

The threshold question is whether a lawsuit would be premature before any of Carl's remaining payments to Paula are due. Carl has made a definite and unequivocal statement to Paula, the other party to the contract, that he cannot and will not perform the balance of the contract at the agreed time. This constitutes an anticipatory repudiation which may be treated as a current breach of the contract. *Paul v Bogle*, 193 Mich App 479, 493-494 (1992).

Some examinees may argue that if the breaching party's only remaining obligation is the payment of money, a repudiation does not give rise to a claim for the payment of installments not yet due. See Restatement 2d, Contracts, §243(3); *Jackson v American Can Co*, 485 F Supp 370, 375 (WD Mich 1980). Because Carl will not be going to Washington, all that remains for him to do under the contract is to pay Paula money. Credit is given to both the examinees who point out this limitation on the anticipatory

repudiation principle and those who do not, but state the general principle correctly.

Carl made oral promises of payment to Paula in exchange for her oral promise to give a particular performance: managing his campaign for as long as he was a candidate, a state of affairs that would end in early August if he did not win the primary. There was consideration to support this contract. Consideration is a legal detriment which has been bargained for in exchange for a promise. *Higgins v Monroe Evening News*, 404 Mich 1 (1978). A promise may be valid consideration of another's promise, as can a performance. *Smith v Thompson*, 250 Mich 302, 305 (1930); *General Motors Corp v Dept of Treasury*, 466 Mich 231, 239 (2002). There was thus a contract supported by consideration from the time the parties exchanged these promises in the form of an offer and acceptance in December 2011. Paula also incurred the detriment of foregoing other consulting opportunities. Beyond that, Paula fully performed her part of the contract until Carl's August 8, 2012 repudiation. The fact that there is no longer a campaign for her to work on does not detract from this.

But not every contract is enforceable. The Michigan statute of frauds, MCL 566.132(1), declares that certain contracts or promises are void unless they or a note or memorandum of the contract or promise "is in writing and signed with an authorized signature by the party to be charged [therewith]." One such category is an agreement "that, by its terms, is not to be performed within 1 year from the making of the agreement." MCL 566.132(1)(a). Here, no writing memorialized Carl's promises to make payments to Paula. One promise ended on November 6, 2012, less than one year from its making and thus outside the statute, while the other promise extended through December 2013, over two years from its making, and therefore was made unenforceable by the statute.

The question whether Paula can enforce the first promise raises an issue of severability. If Paula and Carl's understandings are treated as a single contract, the entire contract is unenforceable against Carl because his obligations cannot be performed within one year of its making. See Restatement 2d, Contracts, §147(3). But parts of a contract can sometimes be treated as severable, so that certain promises can be enforced as "outside" the statute of frauds even if other parts of the contract are "within" the statute and unenforceable. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 537 (1991), citing *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426 (1938); 73 Am Jur 2d, Statute of Frauds, §523, p 153. Restatement 2d, Contracts, §147(1) and comment a, states that if the part of the contract that renders it subject to

the statute benefits only the party seeking enforcement (here, Paula), that party may agree to forego the "faulty" provision and enforce the rest. Under the Restatement, Paula could agree to forego the payments promised for 2013 and enforce Carl's promise to pay her $15,000 per month from the August primary through the November general election. [NOTE: There appears to be no Michigan law applying this rather fine point.] An examinee might argue, more generally, that the ability to sever depends upon whether the consideration for the promises is divisible. *City of Lansing v Lansing Twp*, 356 Mich 641, 658 (1959). Here, Carl made two separate promises in exchange for Paula's promise of a single, indivisible consideration -- managing Carl's campaign as long as he was a candidate. Carl's assurance to Paula that he would provide her with an $8,000 per month income stream in 2013 even if he lost was part of the offer that induced her to agree to provide him with management services. Under this analysis, the statute of frauds voids the entire contract and Paula cannot recover on a contract theory. Spotting the severability issue and providing a cogent answer is more important than which path an examinee chooses to take.

Another approach some examinees may propose is to apply the rule stated in Restatement 2d, Contracts, §130(2): "When one party to a contract has completed his performance, the one-year provision of the statute does not prevent enforcement of the promises of other parties." Now that Carl's campaign is over, Paula's performance is complete, and under this rule the statute would no longer prevent her from seeking to enforce the contract. Although Michigan does not follow this rule, *Ordon v Johnson*, 346 Mich 38, 43-44 (1956), credit will be given to those who apply this commonly recognized principle.

The foregoing approach based on Paula's full performance must be distinguished from the incorrect argument that Carl's "part performance" of his obligations takes the contract outside the statute. The doctrine of part performance is generally applied only to contracts involving the sale of land (or governed by the UCC), and Michigan has declined to extend it. *Dumas, supra*, at 540-541.]

Examinees should also address whether Carl's promises can be enforced under the doctrine of promissory estoppel. The elements of promissory estoppel -- drawing on Sections 139 and 90 of Restatement 2d, Contracts -- are: (1) a promise, (2) that the promissor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, (4) in circumstances such that the promise must be enforced if

injustice is to be avoided. If promissory estoppel can be applied, the first three elements are clearly met, and only the fourth is debatable. One could argue that sufficient "injustice" is being done to Paula to require full enforcement of Carl's promise about 2012 payments. After all, she finds herself in Michigan and unable to return to her Chicago home for almost five months and without three months of additional income that she was promised. It is difficult to argue convincingly that injustice can be avoided only by Carl's promise to pay Paula in 2013. She has adequate time before then to plan to restart her business and seek new engagements, and the sublease on her apartment expires at the end of 2012.

While some might suggest Paula can recover in *quantum meruit*, that theory is not the appropriate option because Carl paid Paula the standard rate for her services as long as she was rendering them. **NOTE:** Michigan courts have been reluctant to apply promissory estoppel to enforce oral employment agreements. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438 (1993). While the consulting arrangement between Carl and Paula is not on its face structured as an employment relationship, it is analogous.

What can Paula recover? For an examinee who has concluded that the entire contract is unenforceable under the statute of frauds and promissory estoppel does not apply, the correct answer is "nothing beyond what she has already received." An examinee who has concluded that the contract is severable and that Carl's promise to pay Paula's $15,000 monthly fee through the November 2012 general election is enforceable, should conclude that Paula is entitled to receive expectation damages: the remaining three months of consulting fees at $15,000 per month. Her loss on the sublet of her Chicago apartment and the cost of her rental in Michigan are incidental to her performing the contract and are not recoverable. That is also the correct approach for examinees who conclude that the 2012 payment promises must be fully enforced on an estoppel theory because Paula's extensive reliance makes enforcement necessary to avoid injustice. Because the remedy for promissory estoppel may be limited as justice requires, and because Michigan courts often say the doctrine must be applied cautiously, a more conservative and fully acceptable alternative is to conclude that, beyond payment for the services she rendered through the primary, Paula can recover only "reliance damages", *i.e.*, her loss on subleasing her Chicago apartment, the cost of her apartment in Michigan, and her moving expenses.

Paula's duty to mitigate should also be discussed by examinees who conclude she can recover expectation damages. During the three months remaining until the November general election, candidates in

Michigan or elsewhere may want to make changes or additions to their staffs, and she should exercise reasonable diligence in seeking out other opportunities. And consulting work will be available in 2013 as well, though assignments may be harder to obtain.

ANSWER TO QUESTION NO. 12

HELEN: Helen may not testify as to the statements that Rita made concerning Jack's alleged invitations to engage in sexual relations because these are inadmissible hearsay. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless it falls within one of the exceptions set forth in MRE 803 or 804. MRE 802.

Rita wants Jack's alleged sexual invitations to come into the record to prove the truth of the matter asserted; *i.e.*, that prior to her threats to sue, Jack was pursuing a sexual relationship with Rita. There are no exceptions to the hearsay rule under MRE 803 that would apply. These statements to Helen were all well after the fact and were made without the type of emotion or expediency that might bring them within an exception. They were made not only after Rita had ample time for conscious reflection and contrivance, they were made after Rita had decided to sue and after the alleged conduct had ceased, meaning that she also had a potential motive for fabrication. *People v Jensen*, 222 Mich Ap 575 (1997). In any event, Helen's repetition of what Rita said Jack said will be cumulative and so should also be excluded under MRE 403. Finally, Jack will be testifying at trial, meaning that the exceptions under MRE 804, which apply when the declarant is unavailable, are not material.

Rita's "that jerk just grabbed me" recitation is a different matter. The court may admit it as an "excited utterance" under MRE 803(2), or alternatively as a "present sense impression" under MRE 803(1). Rita's arm bore fresh physical marks and Rita was agitated, emotionally upset, and then dazed, meaning that, from all appearances, she was still under the stress of the event and had not had an opportunity for conscious reflection or contrivance. *People v Smith*, 456 Mich 543, 551 (1998); *People v Walker*, 265 Mich App 530, 534 (2005). Alternatively, the comment may come in as a "present sense impression," since it was made immediately after and described the fact that Rita had been grabbed. MRE 803(1) (a present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); *People v Hendrickson*, 459 Mich 229, 236 (1998) (description must be "substantially contemporaneous" with the event). Nevertheless, in light of how uncertain the statement is as to identity of the

"jerk" and the difference in physical conduct described (a physical assault versus the more subtle alleged sexual "brushing" that is the subject of the lawsuit), the court may conclude the utterance is more likely to create jury confusion or undue prejudice against Jack, and exclude it under MRE 403. In any event, Helen should not be able to testify to Rita's after-the-fact explanation about Jack having been the "jerk" for the same reasons that she should not be able to testify to her other after-the-fact conversations with Rita.

RALPH: Ralph should not be able to testify. He is not qualified to offer an expert opinion on the likelihood harassment occurred since his training, experience, and education are in benefits administration, not harassment claims. To testify as an expert, the witness must have "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or determine a fact in issue," and must be "qualified as an expert by knowledge, skill, experience, training, or education." MRE 702. Even if Ralph could arguably pass this threshold inquiry, his testimony must be based on reliable principles and methods that have been reliably applied to sufficient facts and data in this case. *Id. See also Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-783 (2004). His proposal to offer an opinion based solely on rumors he overheard about unproven or untested allegations concerning individuals other than Jack and Rita does not pass the reliability threshold.

Nor should Ralph's testimony be permitted as a lay opinion under MRE 701, because his opinion is based entirely on rumors (hearsay), rather than "rationally based on [Ralph's] perception." MRE 701. Ralph witnessed nothing between Rita and Jack, nor does he have first-hand knowledge of alleged sexual harassment involving them or others. Ralph does not have any rationally based perception on which to offer an opinion. *McCalla v Ellis*, 180 Mich App 372 (1989) (doctor who did not witness alleged sexual advances did not have rational perception as to whether advances were welcome or unwelcome). Nor does Ralph have the personal knowledge of the subject matter requisite to testify as a lay witness. MRE 603 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter").

FERN: Fern should not be permitted to testify, as her notes are hearsay not within any recognizable exception. MRE 802. The notes should not be admitted under MRE 803(3) because Rita described only what Jack allegedly did. She did not describe for Fern her feelings about what Jack allegedly did, so she was not making a statement of her "then existing state of mind, emotion,

sensation, or physical condition," MRE 803(3), rendering that hearsay exception inapplicable.

MRE 803(4) also is inapplicable. Rita advised Fern up front there would be no therapy or treatment related to what Rita was saying. Rule 803(4) accepts only those "statements made for purposes of medical treatment or diagnosis in connection with treatment." MRE 803(4).

Finally, MRE 803(6) also does not apply. MRE 803(6) provides an exception for records of regularly conducted activity. Even if Fern's note taking could be considered regularly conducted activity where Rita had expressly disclaimed an intention to treat with Fern, the exception applies only if the records have been "kept in the course of regularly conducted business activity." Fern never sought to keep the notes as a business record, having set up no file and kept no copy of them. It could in fact be argued that the notes were created solely for use in litigation.

ANSWER TO QUESTION NO. 13

The masked man should be charged with (1) bank robbery; (2) armed robbery; (3) assault with a dangerous weapon; and (4) fleeing and eluding police.

Bank Robbery: The germane elements of bank robbery are: (1) putting another person in fear for the purpose of stealing money and (2) from a bank or depository. CJI2d 18.5.

A person who intends to commit any felony and who confines, maims, injures, wounds or attempts or threatens to do so or puts any person in fear thereof for the purpose of stealing from any bank is guilty of bank robbery regardless of his success or failure in the perpetration of the crime. *People v Vannoy*, 106 Mich App 404 (1981), rev'd on other grounds 417 Mich 946 (1983). See also MCL 750.531.

In this case, the elements are presented because the facts describe the place of the robbery as a bank. Moreover, the first teller is pushed away from the drawer, an act that could put the teller in fear. The purpose for this contact with the teller was to take money from her drawer, which the masked man did.

These facts demonstrate proof of the elements of bank robbery.

Armed Robbery: The elements of armed robbery are: (1) the defendant used force or violence or put fear in another person; (2) the defendant did so while he/she was in the course of committing larceny, *i.e.*, the taking and moving of someone else's property/money with the intent to take it away from that person permanently; (3) the person was present while defendant was in the course of committing the larceny; and (4) while in the course of the larceny, the defendant (a) possessed a weapon designed to be dangerous and capable of causing death or serious injury, or (b) possessed any other object capable of causing death or serious injury and the defendant used it as a weapon, or (c) possessed any other object used or fashioned in a manner to lead the person who was present to reasonably believe it was a dangerous weapon, or (d) represented orally or otherwise that he/she was in possession of a weapon. CJI2d 18.1.

In this case, the masked man put the second teller in fear by what he said--she moved aside because of his threat. The masked man took the money from her drawer which establishes the larceny

element. Clearly, the second teller was present during the larceny. Although the masked man was not said to have had a weapon, his oral statement, "Give me what you got or I will blow your face off" establishes an oral representation that the masked man was in possession of a weapon (*i.e.*, a gun--an item capable of blowing face off).

Concerning the armed robbery charge, robbery is a continuing crime that does not end until the offender reaches a point of safety. A person can be convicted of robbery if, before reaching a place of temporary safety, such person uses force to permanently deprive an owner of the actual or constructive possession of his property. *People v Morton*, 471 Mich 248 (2004). Moreover, the robbery statute defines "in the course of committing a larceny" as including "acts that occur . . . in flight or attempted flight after commission of the larceny, or in an attempt to retain possession of the property or money." MCL 750.530.

Here, the defendant threw the chair at the security guard to escape detention and to attempt to retain possession of the bank's money. Because the crime of robbery is a continuing crime, the use of the chair could also satisfy the "armed" requirement as an object used as a weapon that could cause injury.

Assault With a Dangerous Weapon/Felonious Assault: The elements of assault with a dangerous weapon are: (1) the defendant either attempted to commit a battery on someone or did an act that would cause a reasonable person to fear or apprehend a battery; (2) the defendant intended to injure the person or to make the person reasonably fear an immediate battery; (3) at that time, defendant had the ability to commit a battery, appeared to have the ability, or thought he/she had the ability; and (4) the defendant committed the assault with a dangerous weapon. CJI2d 17.9.

In this case, the defendant throwing the chair at the security guard satisfies all the elements above. Of particular significance is the last element. While a chair is not typically a dangerous weapon, the use of it by the defendant (*i.e.*, picking it up and throwing it at the security guard) qualifies it as being used as a dangerous weapon if death or serious injury could result. CJI2d 17.10. The heavy-wooded chair, with its hard metal pronged feet, thrown with velocity, could have seriously injured the security guard.

Fleeing and Eluding Police: The elements of fleeing and eluding are: (1) a police officer in uniform was performing his/her lawful duties and was driving an adequately marked police vehicle; (2) the defendant was driving a motor vehicle; (3) the officer

ordered defendant to stop his vehicle; (4) the defendant knew of the order; and (5) the defendant refused to obey the order by trying to flee or avoid being caught. CJI2d 13.6d See also MCL 750.479a.

In this case, the officer was in uniform, was performing his duty, and was in a marked police car. The facts also indicate the defendant drove around the car that had lights flashing and its siren blaring, clear indications the defendant was to stop. The defendant went around the police vehicle, establishing an effort to evade or avoid being caught as further evidenced by the high-speed chase for ten miles.

ANSWER TO QUESTION No. 14

(1) Standing: Because the federal courts only have the authority under Article III, §2, of the United States Constitution to decide "cases" and "controversies," they will not decide a constitutional challenge unless the person making the challenge has "standing" to raise the issue as part of a live "case" or "controversy." Accordingly, a litigant must meet a three-part test to establish standing: (1) the plaintiff must have suffered or be in imminent harm of suffering an "injury in fact;" (2) there must be a causal connection between the injury and the challenged action of the defendant (causation); and (3) it must be likely that the injury would be remedied by a favorable court decision (redressibility). See *Lujhan v Defenders of Wildlife*, 504 US 555, 560-561 (1992).

Here, because the challenged law is causing injury directly to the unions by prohibiting a method by which unions can collect money for political activities, even from willing members, the unions have established an injury in fact. Moreover, there is a causal connection between the governmental action and the claimed injury because it is a result of a governmental statute that is preventing the unions from making a certain type of collection from its members. Finally, the injury complained of is redressible, since the court could strike down the law as unconstitutional and allow the unions to collect contributions for their political activities. Therefore, the unions have standing to challenge the law. See *Babbit v United Farm Workers Nat Union*, 442 US 289, 299 n.11 (1979) (union had a "sufficient personal stake" to present a "real and substantial controversy" to satisfy standing requirements.)

2. Constitutionality of the Statute: The expenditure of funds to support a political campaign is "speech;" monetary contributions constitute "political expression at the core of our electoral process and of the First Amendment freedoms." *Buckley v Valeo*, 424 US 1, 39 (1976). As a fundamental right, limitations on the expenditure of political funds are subject to "strict scrutiny," and may only be upheld if the restriction furthers a compelling government interest and is narrowly tailored to achieve that interest. *Citizens United v Federal Election Com'n*, 130 S Ct 876 (2010). However, in contrast to restrictions on a political campaign's expenditures, restrictions on political contributions towards campaigns have been treated as "marginal" speech restrictions under the First Amendment "because contributions lie

closer to the edges than to the core of political expression." *Federal Election Com'n v Beaumont*, 539 US 146, 161 (2003). Therefore, limitations on election contributions are not subject to strict scrutiny; rather, limitations are permissible if the regulation is "closely drawn" to match a "sufficiently important interest." *Nixon v Shrink Missouri Government PAC*, 528 US 377 (2000).

Additionally, it is presumptively unconstitutional for the government to place burdens on speech based on the content of the speech. Content-based restrictions on speech are subject to strict scrutiny review, and may only be upheld if necessary to serve a compelling state interest and are narrowly tailored to achieve that interest. *Davenport v Washington Educational Association*, 551 US 177 (2007). Thus, if strict scrutiny review applied to the Michichusetts law, the law would likely be deemed unconstitutional because of the difficulty satisfying the requisite standard.

However, in *Ysursa v Pocatello Education Association*, 555 US 353 (2009), the Supreme Court concluded that rational basis review rather than strict scrutiny review applied to a nearly identical case. There, the Supreme Court concluded that a state does not infringe upon the exercise of First Amendment rights by failing to assist a party in the exercise of its political activities. The state did not suppress or place any restrictions on the unions' political expression; at most, the inability to use payroll deductions made it more difficult for the unions to collect funds for political speech. While payroll deductions would undoubtedly assist the unions, the state was not constitutionally obligated to provide payroll deductions, nor was it otherwise compelled to assist the unions' political activities. Because the unions were free to engage in political speech, the state's decision to decline to provide assistance did not abridge the unions' right to speech and was not subject to "strict scrutiny" under the Fist Amendment. Rather, the court reviewed the law under the "rational basis" standard of review. Under the rational basis standard, the government's decision is upheld unless it bears no rational relationship to any legitimate government interest. The court held that the ban on payroll deductions for political activities survived rational basis review because it reasonably furthered the state's legitimate interest in distinguishing between internal governmental operations and private speech. Therefore, under the analysis articulated in *Ysursa*, the Michichusetts statute is constitutional.

ANSWER TO QUESTION No. 15

Miranda warnings are required when a person is interrogated by police while in custody or otherwise deprived of freedom of action in any significant manner. *Miranda v Arizona*, 384 US 436 (1966), *People v Roark*, 214 Mich App 421 (1995). To determine whether a defendant was "in custody" at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the defendant reasonably believed that he or she was not free to leave. *Id.* at 423. The *Miranda* court noted that general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by its holding. *Miranda*, *supra* at 477.

The ambulance driver for a private company is not a state actor, so regardless of the questions asked and the location of the homeowner, *Miranda* rights were not required to be given. In *Griffin v Maryland*, 378 US 130, 135 (1964), the Supreme Court held that "if an individual is possessed of state authority and purports to act under that authority, his action is state action." However, there was nothing in the fact pattern to suggest that the ambulance driver possessed any state authority. Statements made to private individuals need not be preceded by *Miranda* warnings. *Grand Rapids v Impens*, 414 Mich 667 (1982).

The local police officer is a state actor. Although his questioning of the homeowner may qualify as interrogation, no indication is given the homeowner, while in his own home, was detained in any way nor his movement restricted. On these facts, any claim he was in custody, thereby triggering advice of *Miranda* rights, is unpersuasive. The same is true about the deputy sheriff's first involvement with the homeowner.

However, once the homeowner was taken out of his home and put in a locked police car after having been handcuffed, he was clearly in custody. The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *People v Zahn*, 234 Mich App 438, 449 (1999). As such, before the deputy sheriff could question the homeowner in the squad car, *Miranda* warnings were required.

One of the purposes of *Miranda* warnings is to give the interrogated person the right to cut off questioning by asking for a lawyer. When a defendant invokes his right to counsel, the

police must terminate their interrogation immediately and may not resume questioning until such counsel arrives. *Edwards v Arizona*, 451 US 477, 482 (1981). However, the defendant's invocation of his right to counsel must be unequivocal. *Davis v United States*, 512 US 452, 457 (1994). If the invocation is ambiguous or equivocal, interrogating officers may question further to resolve the ambiguity. *Davis, supra*. Statements such as "[m]aybe I should talk to an attorney" and "I might want to talk to an attorney" were not "sufficient to invoke . . . [the] right to counsel." *People v Tierney*, 266 Mich App 687, 711 (2005). Here, the homeowner's inquiries about counsel did not amount to an unequivocal and unambiguous assertion of the right to counsel and the interrogating homicide detective's clarifying question did not violate the homeowner's *Miranda* right to cut off questioning by requesting counsel.

Finally, a different result is not compelled by a claim that the confession given was "fruit of the poisonous tree" flowing from the improper interrogation in the squad car. The Mirandizing of the suspect makes such an argument unpersuasive.

In sum, only the statement made to the deputy sheriff while in the squad car need be suppressed.